IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2987 of 1988
&
SPECIAL CIVIL APPLICATION No. 3341 of 1988

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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PRAVINCHANDRA VRAJLAL PANDYA & Anr.

Versus

COMMISSIONER

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Appearance:

1. Special Civil Application No. 2987 of 1988
   DELETED for Petitioners No. 1-3
   MR YV SHAH for Petitioner No. 4
   MR JR NANAVATI for Respondent No. 1
   MR SHIRISH JOSHI for Respondents No. 2 & 3

2. Special Civil Application No. 3341 of 1988
   MR RJ OZA for petitioner
   MR JR NANAVATI for Respondent No.1
   MR SHIRISH JOSHI for Respondents no.2 & 3

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CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date of decision: 15/09/2004

ORAL JUDGEMENT

Heard the learned advocates.

These petitions under Article 226 of the Constitution of India have been preferred by the employees of the Bhavnagar Municipal Corporation [hereinafter referred to as, "the Corporation"], the respondent no. 1 herein. The petitioners challenge the promotion order dated 1st June, 1988 promoting the respondents nos. 2 & 3, then Junior Clerks, to the post of Valuation Officer. With the consent of the learned advocates, both these petitions are disposed off by this common judgment.

The petitioner in Special Civil Application No. 2987 of 1988 was at the relevant time serving as Junior Clerk and was holding the charge of the post of Octroi Sub-Inspector. The said petitioner possesses a Degree in Commerce, a Degree in Law and a Diploma in Local Self Government. The petitioner in Special Civil Application No. 3341 of 1988 was at the relevant time serving as a Junior Clerk. He possesses a Degree in Commerce, a Degree in Law and a Diploma in Local Self Government. The said petitioner has claimed that he was senior to the respondents no. 2 & 3. He was wrongly superseded in the matter of promotion to the post of Valuation Officer.

Learned advocates Mr. Shah and Mr. Oza have relied upon the Resolution No. 90 dated 4th February, 1986 passed by the General Body of the Corporation. By the said Resolution, it was decided to create two posts of Valuation Officer in Octroi Division of the Corporation in payscale of Rs. 500-930. It was decided that the candidates concerned shall possess a Degree in Engineering, Science or Commerce and a Degree in Law of a recognized University and shall have technical knowledge. It is submitted that the petitioners possessed the requisite qualifications. The petitioners were eligible for appointment as Valuation Officer. However, the Corporation in utter disregard of the aforesaid Resolution and qualifications required for appointment to the post of Valuation Officer, appointed the respondents nos 2 & 3 as Valuation officer by promotion. The respondents no.2 & 3 do not possess a degree in

Engineering, Science or Commerce. The said respondents, therefore, were not eligible for appointment as Valuation Officer. The promotion of the said respondents is, therefore, contrary to the aforesaid Resolution and is void ab initio.

Learned advocate Mr. Oza has submitted that the aforesaid Resolution dated 4th February, 1986 was passed by the General Body of the Corporation pursuant to the Resolution No. 419 dated 1st January, 1986 passed by the Standing Committee. By the said Resolution, the Standing Committee had proposed creation of 2 posts of Valuation Officer in the payscale of Rs. 500-930 in Octroi Division of the Corporation. The said Committee had proposed the required qualification to be that of a Graduate degree with a Degree in Law and knowledge of Labour Laws, Inquiries, etc. The said proposal was considered for approval by the General Body of the Corporation in its meeting held on 4th February, 1986. The proposal made by the Standing Committee came to be accepted with partial modification as to the qualification for appointment to the post of Valuation Officer, as aforesaid. The said decision was final and was recorded in the Office Note dated 10th February, 1986.

Mr. Oza has submitted that while making the order of promotion dated 1st June, 1988, the Commissioner did take note of the Office Note dated 10th February, 1986, but promoted the respondents no. 2 & 3 who admittedly were not eligible for appointment as Valuation Officer. The said promotion was made on ad hoc basis for a period of six months but the same were confirmed by Order dated 29th August, 1988. Mr. Oza has submitted that the illegal promotion of the respondents nos. 2 & 3 had not only been confirmed but the said respondents have been further promoted as Superintendent.

Mr. Oza has submitted that the Corporation has, in its counter-affidavit, admitted that the petitioner was senior to the respondents nos. 2 & 3. It is also admitted that in view of the criminal prosecution pending against the petitioner, his case for promotion was not considered. Mr. Oza has submitted that mere pendency of a criminal prosecution shall not forfeit the right of the petitioner of being considered for promotion to a higher post. If necessary, the Corporation should have kept its decision in a sealed cover. But such sealed cover procedure was not followed by the Corporation. In the criminal case in question, the petitioner has been acquitted by the judgment and order dated 13th January,

1993. The petitioner was, therefore, entitled for being considered for appointment/promotion as Valuation Officer, atleast since his acquittal. He has submitted that in view of his acquittal from the criminal charge not only the petitioner is entitled to promotion as Valuation Officer from the date the respondent nos. 2 & 3 were so promoted, the petitioner is also entitled to consequential benefits of revision of pay, arrears of wages, further promotion, etc. He has relied upon the judgement of the Hon'ble Supreme Court in the matter of Union of India & Ors. vs. K.V Jankiraman & Ors. [(1991) 4 SCC 109] and of this Court in the matter of [Dr.] R.R Shah vs. Municipal Commissioner, Ahmedabad & Ors. [1993 (1) GLH 339].

Learned advocate Mr. Nanavati has contested the petitions. He has submitted that pending these petitions and since his acquittal in the criminal case, the petitioner in Special Civil Application No. 3341 of 1988 has been given three promotions to the posts of Sr. Clerk, Head Clerk and Superintendent respectively. In the submission of Mr. Nanavati, even in case these petitioners succeed in the petitions, clock cannot be setback. The petitioners cannot be given retrospective promotion nor the consequential benefits.

Mr. Nanavati has submitted that under the provisions of the Bombay Provincial Municipal Corporations Act, 1949 [hereinafter referred to as, "the Act"], it is the Standing Committee which is empowered to determine the strength of the establishment of the Corporation, grades, payscales, etc. Therefore, the Standing Committee has the exclusive power to decide the qualifications to be possessed by the employees of the Corporation. In the present case, the Standing Committee had by its Resolution dated 1st January, 1986 decided the qualifications to be possessed by the valuation officer. After the aforesaid Resolution No. 90 dated 4th February, 1996, the Standing Committee had reconsidered the issue. By Resolution no. 308 dated 25th May, 1986 the Standing Committee had decided that the educational qualification of the Labour Officer/Valuation Officer/Inquiry Officer in the payscale of Rs.500-930 shall be B.A., LL.B and 5 years' experience. According to the said decision, both the respondents no.2 & 3 were eligible for being appointed as Valuation Officer. Accordingly, by impugned order, they were appointed as Valuation Officer by promotion. Mr. Nanvati has relied upon the said Resolution No. 308 passed on 25th May, 1986 and the Appendix dated 15th May, 1986.

The relevant provisions relied upon by the learned advocates are Sections 51 & 53 of the Act and Chapter III of Schedule A to the Act. Sections 51 & 53 of the Act are included in Chapter IV of the Act which deals with the appointment and conditions of service of the Municipal Officers and servants. Mr. Nanavati has submitted that Section 45 of the Act enjoins the Corporation to make appointment of City Engineer, Medical Officer of Health, Municipal Chief Auditor and Municipal Secretary. Thus, the appointment to the said posts are required to be made by the Corporation. With respect to appointment to the other posts in the Corporation, the governing provisions shall be Sections 51 & 53 of the Act. He has submitted that the said sections empower the Standing Committee to make such appointments. In the submission of Mr. Nanavati, the Standing Committee enjoys exclusive power to prescribe qualifications for appointment to various posts in the Corporation and to make appointment. Learned advocate Mr. Oza has submitted that on correct reading of Section 51 of the Act, the powers vested in the Standing Committee are limited to the extent of determination of the number, designations, grades, salaries, fees & allowances of the immediate subordinates to the Municipal Chief Auditor and the Municipal Secretary. He has submitted that these powers vested in the Standing Committee are exhaustive. The said powers do not include determination of qualifications for appointment to various posts in the Corporation. The said power is again restricted to the servants subordinate to the Municipal Chief Auditor and the Municipal Secretary. In other words, with respect to the servants subordinate to the Commissioner, the powers are conferred upon the Commissioner and the Standing Committee has to decide such matters under sub-sections 2 & 3 of Section 51 of the Act. He has submitted that neither Section 51 nor Section 53 empowers the Corporation or the Standing Committee to determine the requirement of educational and other qualifications for appointment to various posts in the Corporation. He has submitted that such provisions are found in Chapter-III of Schedule-A to the Act. He has also relied upon definition of the words,'Appendix', `the Commissioner', `the Corporation' and `the Schedule' contained in Section 2 of the Act.

Sub-section (1) of Section 2 of the Act defines 'Appendix' to mean an Appendix to the Act. Sub-section (9) thereof defines 'the Commissioner' to mean, the Municipal Commissioner for the City appointed under Section 36 and includes an Acting Commissioner appointed under Section 39 of the Act. Sub-section 59 defines 'the

Schedule' to mean, the schedule appended to the Act. Section 20 of the Act provides for constitution of "Standing Committee". Chapter-IV of the Act comprising sections 45 to 60-A provides for municipal officers and servants their appointment and conditions of service. Sub-section 1 of Section 45 of the Act enjoins the Corporation to appoint fit persons to be City Engineer, Medical Officer of Health, Municipal Chief Auditor and Municipal Secretary. Sub-section 3 thereof provides inter alia, that an Officer appointed under the said section shall have such qualification as may be prescribed under the rules. Section 51 deals with the number, designations, grade, etc. of other municipal officers and servants. Sub-section 1 thereof empowers the Standing Committee to determine the number, designations, grades, salaries, fees and allowances of Auditors, Assistant Auditors, Officers, Clerks and servants to be immediately subordinate to the Municipal Chief Auditor and the Municipal Secretary respectively. Sub-section 2 thereof enjoins the Commissioner to prepare and bring before the Standing Committee a statement stating forthwith the number, designations and grades of the other officers and servants who should in his opinion be maintained; and the amount and nature of the salaries, fees and allowances which he proposes should be paid to each. Sub-section 3 enjoins the Standing Committee to sanction such statement with or without modifications as it deems expedient. Section 53 of the Act deals with the power of appointment. Subject to the restrictions mentioned in sub-section 1, the power of appointing municipal officers vests in the Corporation. The power of appointment of municipal officers and servants under the immediate control of the Municipal Chief Auditor and the Municipal Secretary vests in the Municipal Chief Auditor or the Municipal Secretary; as the case may be, subject to the approval of the Standing Committee. Section 54 of the Act provides for manner of making appointments. Chapter XXIX of the Act provides for rules, byelaws, regulations and standing orders. Section 453 provides that, `rules in Schedule-A as amended from time to time shall be deemed to be part of this Act.' Sub-section 1 of section 454 empowers the Corporation, subject to the restrictions imposed therein, to add rules to Schedule-A and to amend, alter or annul any rule in the said Schedule-A. Section 455 makes the power to make, add to, alter or rescind any rule under Section 454, subject to the sanction of the State Government and the previous publication. Sub-section 3 of Section 457 of the Act, inter alia, empowers the Corporation to make rules to provide for or regulate the qualifications necessary for and the method of appointment of, municipal

officers and servants, to posts the power of appointment to which vests in the Corporation; the mode of appointment to other posts. Section 465 enjoins the Standing Committee to frame regulations not inconsistent with the Act and the rules but in consonance with any resolution that may be passed by the Corporation prescribing the qualifications required for appointments to posts in municipal service other than those specified in sub-clause (a) of clause (3) of Section 457. Chapter III of Schedule-A provides for method of appointment of certain municipal officers and servants and their duties and powers save in the case of temporary appointments and acting appointments. Rule-3 thereof enjoins the Corporation to prescribe the qualifications required for each post, the power of which appointment vests in the Corporation, with the approval of the State Government.

On perusal of the above provisions, it is evident that power of appointment of officers and servants of the Municipal Corporation vests either in the Corporation or in the Municipal Chief Auditor or the Municipal Secretary; as the case may be. The Standing Committee is empowered, inter alia, to determine the number, designations, grades, salaries, fees and allowances of servants immediate subordinate to the Municipal Chief Auditor and the Municipal Secretary. In case of other servants, such powers are conferred upon the Standing Committee; subject to the proposal to be made by the Commissioner. Neither section 51 nor section 53 of the Act empowers the Standing Committee to determine the qualifications required to be possessed by the Officers and servants of the Municipal Corporation. Such matters are required to be provided by the Corporation under Rule 3 of Chapter-III of Schedule-A to the Act or by rules made in exercise of power conferred by Section 454 of the Act or by the Standing Committee by regulation made in exercise of power conferred by Section 465 of the Act, as the case may be. In absence of rules or regulations made in exercise of power conferred by Section 454 or section 465 of the Act, the decision of the Corporation shall prevail. It is well settled that the Corporation acts through the body of Councillors i.e. the decision of the General Body of Councillors shall prevail.

In the present case indisputably the proposal made by the Standing Committee with respect to the creation of posts of Valuation Officer and the qualifications required for appointment to the said posts made under its Resolution No. 419 dated 1st June, 1986 came to be approved by the General Body of the Corporation with modification as aforesaid. The said

decision of the General Body of the Corporation shall be final and shall prevail over any previous or subsequent decision of the Standing Committee. The decision dated 4th February, 1986 was also taken note of in the Office Note dated 10th February, 1986. In view of the said legal position, the Standing Committee had no power or authority to alter the decision of the General Body of the Corporation as was done in the present case by the Standing Committee by its Resolution No. 308 dated 25th May, 1986. It is also doubtful whether such decision was taken on 25th May, 1986 as averred. The said Resolution No. 308 does not refer to such decision or to the appendix. What is produced before the Court is appendix dated 15th May, 1986. In my view, the action of the Standing Committee in modifying the required qualification was without the authority of law. The same is, therefore, illegal and inoperative. Appointments made pursuant to the said decision, contrary to the decision of the General Body of the Corporation are, therefore, illegal and void ab initio. The respondents nos. 2 & 3 admittedly did not possess the qualifications required for appointment as Valuation Officer; as determined by the General Body of the Corporation and recorded in the Office Note dated 10th February, 1986. The promotion of the respondents no. 2 & 3 to the posts of Valuation Officer was illegal and void ab initio. The Municipal Commissioner having taken note of the Office Note dated 10th February, 1986, without referring to their eligibility, promoted the respondents no.2 & 3 to the post of Valuation Officer in contravention of the aforesaid Office Note dated 10th February, 1986. Hence, the action of the Municipal Commissioner in promoting the respondents no. 2 & 3 as Valuation Officer was equally bad and illegal. The promotion of the respondents no. 2 & 3 as Valuation Officer being void ab initio, their further promotion to the post of Superintendent also is bad and illegal.

In the matter of (Dr.) R.R Shah vs. Municipal Commissioner, Ahmedabad & Ors. [Supra], the Division Bench of this Court upheld the appointment of the respondent no.4 as Additional Medical Officer of Health. The Court held that under Section 53 of the Act the Corporation alone had the power of appointment. The exercise undertaken by the Standing Committee in forming selection committee and drawing a select list was itself without jurisdiction. In the matter of Union of India & Ors. [Supra], the matter under consideration was pendency of preliminary inquiry or criminal investigation against a Government servant. Learned advocate Mr. Oza has specifically relied upon the observations made in

paragraph 25 & 26 of the judgment. With respect to the consequential benefits, it has been held that, "..The normal rule of `no work no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his."

In view of the above discussion, the order dated 1st June, 1988 made by the Municipal Commissioner [Annexure-C to the petition] in so far as it relates to promotion of respondents no. 2 & 3 as Valuation Officer is quashed and set-aside. The respondents no. 2 & 3 shall forthwith be demoted to the post of Junior Clerk. It is further directed that the posts of Valuation Officer be filled-in in accordance with rules made in exercise of power conferred by Section 454 of the Act. In absence of such rules, the said posts be filled-in in accordance with the Office Note no. 192 dated 10th February, 1986. If the petitioners herein are eligible for such appointment their cases shall also be considered in accordance with such rules or Office Note No.192 dated 10th February, 1986 and the directions issued by this Court [Coram: M.S Shah, J.] in Special Civil Application No. 3192 of 1986 :: Decided on 29th November, 2000.

In view of passage of time and the promotions earned by the petitioner in Special Civil Application No. 3341 of 1988, the prayer for retrospective promotion and consequential benefits is rejected.

The petitions are partially allowed in the above terms with costs. Rule nisi issued in each petition is made absolute to that extent.

The registry shall send the writ forthwith. The registry shall maintain copy of this order in each petition.

{Miss R.M Doshit, J.}

Prakash*